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SUPREME COURT OF THE UNITED STATES

October Term, 1981

SYDNEY M. EISENBERG

Petitioner

vs.

GEORGE D. CROWLEY

Respondent

ON PETITION FOR CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Ruled As A Matter Of Law That Plaintiff-Respondent George Crowley Filed Motions After Verdict In The Defendant-Appellant's Federal Tax Case In A Timely Manner?
   The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.
2. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Rendered Erroneous Instructions To The Jury?
   The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.
3. Did The Trial Court Violate Defendant's Right To Due Process of Law Under The

United States Constitution When It Rendered A Verdict Form Containing Assumed Facts In Dispute And Therefore Invaded The Province Of The Jury?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

4. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Refused To Adjourn Motions After Verdict Until A Transcript Could Be Prepared?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

5. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Allowed Plaintiff's Counsel To Refer To Defendant As Being Guilty Of Murder In The Presence

Of The Jury?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

6. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Denied Defendant-Appellant His Constitutional Right To Confront Witnesses Testifying Against Him?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

7. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Allowed To Stand Plaintiff Crowley's Refusal To Interpose A Defense For Defendant In the Tax Trial Without Making A Finding That Such Was Malpractice?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

8. Did The Supreme Court Of The State Of Wisconsin Violate Defendant's Right To Due Process Of Law When It Refused To Review The Decision Of The Wisconsin Court Of Appeals When Said Decision Was Authored By Honorable Leo Hanley, A Justice Who The Defendant-Appellant Filed A Timely Request For Substitution Against Which Was Ignored? The Wisconsin Supreme Court answered this in the negative.

LISTING OF PARTIES

All parties to this proceeding are George D. Crowley and Sydney M. Eisenberg.

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OPINIONS OF LOWER COURTS

Neither the decision of the Wisconsin Court of Appeals (App. p. A3) nor the decision of the Wisconsin Supreme Court (App. p. A1) were published in any official or unofficial report.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States Supreme Court is based on United States Code Title 28, Section 1257(3). The Wisconsin Court of Appeals filed its decision in this matter on July 21, 1981. (App. p. A3) The Wisconsin Supreme Court denied appellant's Petition for review on December 7, 1981. (App. p. A1) No petitions for rehearings were filed by either party.

CONSTITUTIONAL PROVISIONS

ARTICLE XIV - UNITED STATES CONSTITUTION - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION: APPORTIONMENT OF

REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the

Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to

support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emanicipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

This was an action originally commenced by the filing of a Summons and Complaint by George D. Crowley alleging that Sydney M. Eisenberg owed him attorney fees for Crowley's representation of Eisenberg during a federal criminal tax case involving three counts of filing false income tax returns.

Although there was a substantial body of evidence to contradict the government's case, nothing whatsoever was presented and, for the most part, it was not properly investigated, although Mr. Crowley was paid over $21,000.00 to do so. The ramifications of such evidence and the impact of such is still unfolding, although more than five years have elapsed since the trial. The chief government witness selectively obtained evidence from Mr. Eisenberg and drew erroneous conclusions therefrom without any regard to Mr. Eisenberg's

constitutional rights. Later this witness changed and altered his testimony to cover up his earlier compromises of Mr. Eisenberg's rights and the very facts themselves. As can be noted in the order of Judge Harlington Wood this issue and the alleged perjury effort to cover up such procedure still is under serious scrutiny and investigation. Judge Wood is presently taking testimony on this subject on a writ of corum nobis. Although the evidence needed to acquit Eisenberg in his tax trial was presented to Crowley he did nothing with it.

In serious disregard of Mr. Eisenberg's constitutional rights, Crowley waived the right to put in a defense over the strong objection of his client. One of the cornerstones of our judicial system is the duty and right to defend oneself against false legal accusation. One constitutional question there-

fore is whether an attorney can waive the right to testify and defend himself. It is the position of this petitioner that any attorney cannot waive such a right of a defendant. There are a number of other constitutional issues that are involved, such as including a waiver of jury, counsel's improper tactics and misconduct causing defendant to waive a jury, as well as the State court improperly compelling Eisenberg and an attorney on his behalf to argue motions and prepare appeals without the benefit of a transcript where there is an issue of fact as to what happened in court, the court reporter being fully paid in advance and failed to produce a transcript until after ordered to do so several times by the Wisconsin Court of Appeals, long after the original decision was made by the initial trial court.

Mr. Crowley did not stop there, however.

When the tax trial judge suggested that he might favorably consider a motion for a new trial in the interests of justice, Crowley deliberately filed the same untimely. This forced the federal trial judge to construe it as a motion for a new trial based on newly discovered evidence. Since the format was an "interests of justice" approach, the motion was not properly organized as one based on newly discovered evidence. As such, it was denied. In the instant case therefore, Eisenberg counterclaimed for legal malpractice. The trial of this matter was marked by repeated denials of due process. The night prior to the trial the prime Milwaukee newspaper printed a particularly adverse article on Eisenberg. When questioned, most jurors acknowledged reading the article. The trial judge failed to properly instruct the jurors. During closing arguments opposing counsel referred to Eisenberg

as a "murderer". This slander was totally ignored by the trial court and a mistrial was not ordered. Other constitutional rights were denied. The special verdict strongly suggested that Eisenberg owed money to Crowley, and instructions that the Trial Court said were to be given were withheld. Finally, defendant was also denied his constitutional right to a fair trial because he was forced to argue motions after verdict without the assistance of having a trial transcript prepared. This occurring even though he was absent for part of the trial and was called a murderer in another part, and paid for a transcript withheld by the reporter from the Trial Judge and appellant. Opposing counsel, of course, denied he made the remark. The request for a continuance on motions after verdict until a transcript could be completed was denied, and the defendant was not believed. All motions were denied.

On Appeal to the Court of Appeals a reserve judge had to be appointed to fill a vacancy. Judge Leo B. Hanley was appointed. Mr. Eisenberg sought to exercise his constitutional right to request a substitution of this justice. This demand was blatantly ignored. It was not even given the due process requirement of an order denying it. Further, Judge Hanley not only sat in on the decision; he authored it. The Court of Appeals affirmed the trial court's rulings.

The Supreme Court of Wisconsin was petitioned for review. On December 7, 1981 they denied this petition.

STATEMENT OF FACTS

This action resulted out of legal representation of the defendant-appellant, Sydney M. Eisenberg, by plaintiff-respondent, George D. Crowley. Sydney M. Eisenberg had been indicted for three counts of willfully filing

a false income tax return in 1975. Defendant did not prepare the tax returns in question. Initially, other lawyers were retained to file dismissal motions and other attacks against the indictments, but, these having been denied, it appeared obvious the matter would proceed to trial. Defendant planned a trial on all the issues. Thus, in December of 1975, Sydney M. Eisenberg decided to look for experienced trial counsel. Through other members of the State Bar, he was referred to George D. Crowley, of Chicago, Illinois. When he first met with Mr. Crowley, he discussed representation. At that time dismissal motions had been filed by Attorney James Shellow. Mr. Eisenberg expected Mr. Crowley to argue the motions. As it occurred, no one argued the motions, and they were denied.

The retainer agreement was that Sydney M. Eisenberg would pay George D. Crowley the

sum of Twenty Thousand Dollars for the trial and including any appeal to the Court of Appeals. If the matter had to be appealed, an additional Three Thousand Dollars would be paid for printing of briefs. The fee did not include a petition for certiorari to the United States Supreme Court, if necessary. If the dismissal motions above noted were successful, only Ten Thousand Dollars would have to be paid. This was the entirety of the fee agreement.

A total of Twenty Three Thousand Dollars was paid to George D. Crowley. The case was to be tried by a jury.

At the commencement of the trial Mr. Crowley asked Mr. Eisenberg to sign a jury waiver. This was the first Mr. Eisenberg knew the case was not going to be tried to a jury. Due to the intimidation of the circumstances, Mr. Eisenberg had nothing to do but to sign

the statement. Later it was determined that without discussion with his client, Mr. Crowley waived the jury at a pretrial he would not allow Mr. Eisenberg to attend.

After the Government rested its case, Crowley moved for a dismissal. This motion was denied. Then, without putting on a single witness, Mr. Crowley rested the defense case. He moved again for dismissal. That motion was, likewise, denied, and the defendant was convicted.

Later Sydney M. Eisenberg discovered that George Crowley had not personally interviewed any of the prospective witnesses. Mr. Eisenberg had submitted a detailed list of people, had accountants standing by, and practically begged to testify on his own behalf. All of this was ignored by plaintiff-respondent, George D. Crowley.

Not only did George Crowley put Sydney

Eisenberg in a position where he lost a great deal of stature, was the subject of public disgrace by way of the loss of his license to practice law, but Mr. Crowley continued to bill Mr. Eisenberg in excess of their agreement for work that was not completed in any competent or acceptable fashion.

When George Crowley brought this suit to collect the money he claimed was owing, Sydney Eisenberg counterclaimed for the legal acts of malpractice committed.

During this trial the Trial Court would not allow Mr. Eisenberg to cross-examine witnesses who were testifying against him. This was absolutely necessary because his counsel, Ray McCann, was not present at the Federal Court trial.

Defendant told Federal Judge Wood, when he was permitted to speak for the first time,

after the Judge announced the conviction, that he had told his attorneys he wanted to take the stand and that he still wanted to take the stand. This meant that defendant was entitled to move within seven days for a new trial in the interest of justice. Mr. Crowley assured him it would be done. He neglected to do so. He is certainly guilty of negligence as a matter of law.

Defendant maintained that under no circumstances was he interested in paying Twenty Thousand Dollars for not defending an action such as signing a false return without putting in a defense of any kind, shape, form or manner. Defendant is an experienced lawyer, and under no circumstances whatsoever would he ever have done this to anybody else, nor did Mr. Crowley have a right to treat the defendant in this manner. Plaintiff Crowley simply returned to Chicago, and neglected to

prepare the motion, which should have been brought within seven days for a new trial in the interest of justice. Instead, plaintiff Crowley later got out a motion for a new trial on the grounds of newly discovered evidence, losing an advantage obtained by Mr. Eisenberg, who then determined that Mr. Crowley simply did not understand the case, was in a hurry to get back to Chicago to celebrate a birthday party, and thus terminated defendant's right to a fair trial. Defendant retained a new lawyer to take appeal to the Court of Appeals and seek a new trial there. The new appeal lawyer lost the case, primarily because the case had not been rebutted by Mr. Crowley

Moving for a new trial in the interest of justice when the Federal Judge observed that defense counsel never defended the case, never called a witness, nor attempted to give

any explanation of what had happened, is far different from seeking a new trial on the grounds of newly discovered evidence. Such a difference is both patent and obvious to anyone bothering to understand the situation. Judge Fiedler apparently did not realize the significance of Attorney Ray McCann not having tried the Federal Court case, and not being aware of all of the facts in said case. When Judge Fiedler refused to permit defendant to interrogate the witnesses, defendant was again placed in a weird position. In the Federal Court case defendant had to sit a distance away from plaintiff Crowley, because plaintiff Crowley insisted that he would try the case without any suggestions from defendant. When defendant attempted to write questions on a piece of paper to be asked of the witnesses, his attorney, Mr. Crowley, disregarded them and threw them away. Defen-

dant therefore withdrew entirely from sitting anywhere near Attorney Crowley and moved to the divider rail where the spectators are.

Judge Fiedler refused to permit Mr. Eisenberg to ask any questions, even though he should have been permitted to do so under the law, and all of the circumstances. Attorney McCann could hardly have been expected to know all the circumstances in the tax case as well as the instant case, when the intricate issues which were involved had to be fully explained to a jury. Certainly here was a miscarriage of justice. Plaintiff and his co-counsel, as well as other witnesses, should have been examined by defendant, and it was clearly a miscarriage of justice under all the circumstances. Mr. McCann could not possibly have remembered all the issues involving negligence by the plaintiff in the Federal Court case.

One can easily imagine how the jury viewed the situation when Mr. Eisenberg, attempting to whisper to Mr. McCann, who had difficulty in hearing the whispers, with Mr. McCann asking a question, and subsequently Mr. Melnick telling the jury to remember how Mr. Eisenberg had dominated this trial. Therefore, the conclusion would only be that Mr. Eisenberg did the same thing in the tax hearing. The truth is that defendant appeared to be attempting to dominate Mr. McCann by insisting on asking certain questions without shouting why he was doing so. The situation verged on the ludicrous. Certainly, it appeared if defendant would attempt to dominate Mr. McCann and get him to ask questions he did not want to ask, he must have done the same thing with Mr. Crowley. The effect was chilling on defendant's rights. Under all the circumstances, Judge Fiedler was obviously mistaken when he ruled

against Mr. Eisenberg interrogating witnesses. Every defendant has a right to be co-counsel in his own case if he is an attorney.

Appellant had been unable to find in the transcript Mr. Eisenberg's request of Judge Fiedler to permit him to interrogate the witnesses. The failure of the reporter to so report is typical of the reporting in this case. The Court is aware of the difficulty Appellant has had in even obtaining the transcript herein. Appellant therefore moved to expand the record by permitting the affidavit of Sydney M. Eisenberg to be included in the record, to the effect that he did request the Court for permission to interrogate the witnesses, and the Court refused. The failure of the Trial Court to provide adequate reporting services is also significant. No transcript was available for the hearing on motions after verdict herein. The testimony

allegedly transcribed was apparently done by the reporter dictating her notes to someone else. A tremendous amount of time was lost throughout all this. Mr. Melnick interrogated defendant on his income taxes. He showed gross income of Eisenberg for one year of over $900,000. When Defendant attempted to show the net income of only $14,000, the Court stopped defendant, and said he would straighten out the entire matter by an instruction to the jury. The Trial Judge did nothing further in the matter, and the jury was left with the conclusion that defendant was earning about a million a year, had clearly murdered a judge (not literally, just "cleverly"), was suspended twice as a lawyer, was saved by the plaintiff lawyer from going to prison and that his lawyer, for totally undisclosed reasons, had no duty to defend the case, investigate witnesses, call witnesses to the stand, discuss

and obtain from his client an agreement to waive a jury, not to tell the Federal Judge there will be no jury if he is the attorney for the defendant at time of trial. There is only one conclusion to reach here. There was a miscarriage of justice and violation of constitutional law.

During the trial the Trial Court erred on several occasions, allowing the jurors to become biased by way of newspaper clippings nine of the twelve admitted reading, by allowing the plaintiff's counsel to make gestures and derogatory references to the defendant as a murderer, and making other rulings in violation of constitutional rights.

The jury in answering a verdict, that, in itself, made factual determinations by suggesting that two separate agreements were made between plaintiff and defendant, one for fees to the end of trial and one for fees after,

awarded the Plaintiff damages and denied the Defendant any remuneration.

From this error-filled trial the Defendant appeals, seeking reversal and new trial.

ARGUMENT

I. THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS WHEN IT RULED AS A MATTER OF LAW THAT PLAINTIFF-RESPONDENT GEORGE CROWLEY FILED MOTIONS AFTER VERDICT IN THE DEFENDANT-APPELLANT'S FEDERAL TAX CASE IN A TIMELY MANNER.

An opportunity for a hearing is one of the essential elements of due process. Shields v. Utah Idaho C. R. Co., 305 U.S. 177, 83 L. Ed. 111, 59 S. Ct. 160 (1939); Powell v. Alabama, 287 U.S. 45, 77 L. ed 158, 53 S. Ct. 55 (1930) 84 ALR 527. In the case at bar the plaintiff-respondent George Crowley totally neglected the defendant's right to be heard on a motion after trial attacking the criminal finding by the federal judge on grounds of the interests of justice. The uncontested fact remains that no timely motion of this sort was filed in the Federal tax case by the plaintiff-respondent. The Trial Court in the present action, with no support whatsoever, found that the motion was

timely as a matter of law. This arbitrary action by the Trial Court extended the violation of defendant's right to due process. Washington ex rel Oregon R. & Nov. Co. v. Fairchild, 224 U.S. 510, 56 L. Ed. 863, 32 S. Ct. 535 (1917). The right to due process also includes the right to have decisions of the Court based on evidence received. Baltimore & O. R. Co. v. United States, 298 U. S. 349, 80 L. Ed. 1029, 56 S. Ct. 797 (1932).

Mr. Eisenberg specifically requested his counsel to file immediately after the decision in the tax case a motion for a new trial in the interest of justice. This request was made when the Court appeared to be sympathetic to the taxpayer's statement to the Court telling the Judge he wanted an opportunity to take the stand and explain the facts. The facts to be explained had to be while defendant was on the stand, and not in a statement to the Court

after a finding of guilty.

Defendant requested an immediate motion for rehearing in the interests of justice, but Mr. Crowley procrastinated until the seven days were up and over. This was patent and clearly negligence.

The trial court herein addressed this point on several occasions. It first addressed the point in the following discussion in chambers:

> "THE COURT: Let the record show this is a conference held in the absence of the jury. Present are both counsel and both parties to this action. The Court has concluded that the questioning by Mr. McCann, both of Mr. Manning and of Mr. Crowley, relate to this motion filed with the Federal Court on the grounds for a new trial on the grounds of newly discovered evidence has been completely misleading.
> "I have read defendant's Exhibit Two, which we received in evidence yesterday, and which constitutes the decision of Judge Wood relating to those motions. And at pages fifteen and sixteen Judge Wood differentiates

"between the timely filing of that motion for different reasons than what is appearing before this jury.
"At page fifteen, at the bottom thereof, Judge Wood uses this language: 'If a motion for a new trial based upon newly discovered evidence is made within seven days after verdict of a finding of guilty' and at the top of page sixteen, 'is to be granted when in the interest of justice'.
"He goes on to state that a motion for new trial based upon newly discovered evidence made at the end of a seven day period would be granted and conditions that he then there tests. That is entirely different from the impression that is being given to this jury on the basis of these questions.
"These questions by Mr. McCann to both of these witnesses has been designed, it seems to me, to make it appear that the motions was not timely filed, and that is not the fact based on Judge Wood's decision."

The Trial Court capped all questioning along these lines after Mr. McCann was inquiring into the propriety of an oral motion made after trial when the Federal Rule specifically called for only written motions.

"Mr. Melnick: I am going to move that this all be stricken."
"The Court: The defendant's Exhibit two,

"which has been identified as post-trial motions of the defendant, there is a filing stamp of the U. S. District Court of December 10, 1976, the Judgment or -- strike that."

"The date of sentencing, June 29, 1976. Defendant's Exhibit Eight, which has been received in evidence, relates to the Federal Rules and provides for the filing of a motion based on newly discovered evidence within two years after judgment, and further provides that a motion for a new trial based on any other grounds other than newly discovered evidence must be within seven days after verdict or finding of guilty and such further time as the Court may fix during the seven-day period."

"The only motion filed on behalf of the defendant for a new trial was that on the grounds of newly discovered evidence. The Court finds as a matter of law that the motion was timely filed. The objection is sustained. The evidence is irrelevant."

Mr. Crowley was simply in a hurry to leave Milwaukee. He had obtained $23,000.00 from Defendant. Defendant was disgraced by virtue of the conviction, and plaintiff Crowley had simply decided that he was not going to defend the case, was going to "pick up the marbles" and leave town. This is what he did.

"New Evidence Submitted by Defendant. Defendant has asked this Court to consider evidence not presented at trial in conjunction with his Motion for Judgment of Acquittal. The question presented on motion for judgment of acquittal pursuant to Fed. R. Crim P. 29 is whether the evidence adduced at trial is sufficient to sustain a conviction. Rule 29 does not authorize consideration by the Court of evidence not presented during the course of the trial.

"This Court agrees with the Government that the proper procedure for consideration of new evidence is set forth in Fed. R. Crim P. 33 which governs motions for new trial. Accordingly, this Court will regard defendant's requested admission of new evidence as a motion for a new trial.

"If a motion for a new trial based upon newly discovered evidence is made within seven days after verdict or a finding of guilty it is to be granted when in the interest of justice. Wright, Federal Practice & Procedure, §557. If a motion for a new trial is not made within this seven-day period, a new trial is warranted only if the newly discovered evidence discloses: (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative of impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. Wright, Federal Practice & Procedure, §557.

"Since the newly discovered evidence in the case at bar was not presented to the Court within seven days of this Court's judgment of guilty, the more stringent standards of the four-part test must be applied. ...."

The failure to move for a new trial in the interest of justice within seven days was devastating, in view of the Judge's comment subsequent to hearing defendant's statement after a finding of guilty when defendant was asked if he had anything to say. It is obvious from the reading of this decision that Judge Wood construed the motion as one for a new trial based on newly discovered evidence because that was the only motion that could be contemplated at the time. The motion, itself, did not address itself in its entirety to newly discovered evidence. Even in those portions where it did the burden for newly discovered evidence submitted before the expiration of the seven-day period is much more favorable to the party coming forth with it

than any motion made by the plaintiff-respondent in the Federal Court which came too late to take advantage of a request for a new trial in the interest of justice. It came too late to take advantage of the favorable newly discovered evidence rules during the first seven days after sentencing.

Furthermore, the issue goes far beyond whether, under some distorted legal view the motion plaintiff-respondent made was timely. The issue also presents questions as to why either motions that would be much more appropriate and more likely to be granted, why these motions were not made at all.

The Trial Court, by ruling as a matter of law that the motion was timely filed, and that all such inquiry was irrelevant, abused its discretion. Only in the clearest of cases, when the evidence is uncontroverted, should a trial court make factual findings as a matter

of law. If there is any question the ruling should be reserved until the jury can pass on some fact. Hoffman v. Wausau Concrete Co., 38 Wis. 2d 472, 207 N.W. 2d 80 (1973); Zillmer v. Miglautsch, 35 Wis. 2d 691, 151 N.W. 2d 741 (1967).

The case presented by defendant's counterclaim was most apparent in the callous neglect of plaintiff to file these important motions after continual pleading by defendant. It is clearly grounds for a new trial in the interest of justice that defendant be allowed to litigate his unfair treatment by the plaintiff-respondent.

II. THE INSTRUCTIONS TO THE JURY GIVEN BY THE TRIAL JUDGE VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS.

Due process requires that the tribunal hearing a matter be fair and impartial. Re Murchison, 349 U.S. 133, 99 L. Ed. 942 S. Ct. 623 (1955); Buck v. Bell, 143 Va. 310, 130

S. E. 516, 51 ALR 855 aff'd. 247 U.S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1921). Yet in the case at bar the jury was given partial information and tainted in many ways.

A. THE ISSUE OF ADVERSE PUBLICITY WAS AN ISSUE DURING THE TRIAL AND THE JURY SHOULD HAVE BEEN INSTRUCTED.

It was noted by the Court during the December 5, 1979 proceeding that a Milwaukee Journal article appeared in the paper the previous evening. The article dealt with Mr. Eisenberg's suspension from practice and a pending appeal on that issue. Nine of the twelve jurors and two alternates admitted to reading the article. The Court asked each of the jurors that read the article if they thought the article could be put out of their minds when deliberating. All responded they could. The Court, however, gave no instruction for them to so disregard the article.

It is obvious that defendant-appellant

and his attorney held the position that this article was damaging. The defendant stated the following about the article:

> "(In chambers) The Defendant. This is a situation -- First of all, the article is incorrect as to reporting of it. The only -- Your Honor, I wasn't planning to argue until we saw this in the paper. There are certain things that have to be read to the jury to get the record straight that are in evidence. I don't intend to go outside of the evidence, nor would I do anything to bring about an objection. I am not going to; if he wants to object, he can.
> "THE COURT: I have ruled that you may argue.
> "The Defendant: On this thing, we were talking about how to correct it. We don't want to move for a mistrial. We don't know what damage was done and so forth; and we thought -- and this -- I don't know how Your Honor would think it could be handled; but, if, for example, the jury were simply asked did they -- raise your hand if you read the article, that would be one indication to you.
> "The Court: Suppose all fourteen raise their hand, what am I supposed to do?
> "The Defendant: If they did read it, I would assume -- I don't know. I don't know. I thought this, Judge --
> "The Court: I will handle it.
> "The Defendant: Let me just suggest this, what Mr. McCann said; if they did read it, we get instruction; and, if I were to read

"from the evidence, from the matters in evidence to the jury, so that they at least -- I could describe, try to show what happened, believe the Journal or believe the evidence.
"The Court: I will handle that article."

There can be no doubt that this article and its effect on the jury was an issue during the trial. The Wisconsin Supreme Court has held that it is error for a court to refuse to instruct the jury on an issue which is raised. Lutz v. Shelby Mut. Ins. Co., 70 Wis. 2d 743, 235 N.W. 2d 426 (1975). Even if the Court adopted the position of the plaintiff-respondent's counsel that the article was not prejudicial the jury should have been instructed since the impact of the article was in conflict. U. S. Fidelity & Guaranty Co. v. Frantl Industries, Inc., 72 Wis. 2d 478, 241 N.W. 2d 421 (1976).

After it was demonstrated that a substantial majority of the jurors had read the article, the absence of the requested instruct-

ions was erroneous.

B. NO INSTRUCTION WAS SUBMITTED REGARDING DEFENDANT'S GROSS INCOME AS OPPOSED TO DEFENDANT'S NET INCOME.

Another point where no instruction was given, although the opportunity clearly presented itself that the jury would be confused, was in regard to defendant's income. Plaintiff's counsel, using a tax return that was in evidence cited the fact that defendant had earned $900,000 in one year. Defense counsel maintained that the plaintiff's attorney was arguing under a theory of gross income. During the year in question the defendant netted $14,000, a substantial difference. The case law in Wisconsin requires that when inconsistent theories are advanced, instructions encompassing and explaining both theories must be given. Aetna Cas. & Sur. Co. v. Osborne McMillan Elevator Co., 26 Wis. 2d 292, 132 N.W. 2d 510 (1965).

In conclusion, the instructions given to the jury were seriously deficient. When coupled with the following argument, that the verdict form used, in that it contained assumed facts, invaded the province of the jury, it becomes obvious that the jury was biased and the verdict tainted. A new trial must, therefore, be accorded the defendant-appellant.

III. THE VERDICT FORM CONTAINS ASSUMED FACTS IN DISPUTE AND THEREFORE INVADED THE PROVINCE OF THE JURY AND VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS

As was noted above the tribunal hearing a matter should be free from partiality. Re Murchison, supra. Another aspect that compromised the impartiality of the jury was the suggestive form of the verdict.

The first three questions of the special verdict utilized in this case are as follows:

> "1. What sum of money, if any, is due the plaintiff, George D. Crowley, by the defendant, Sydney M. Eisenberg, for services rendered by the plaintiff to the defendant up

"to June 24, 1976, in the following respects:

a. Legal Services? Answer:$_____
b. Expenses? Answer:$_____

"2. Did the defendant agree to pay the plaintiff for legal services rendered and expenses incurred after June 24, 1976? Answer:_____

"3. If you answer Question 2 "Yes" then answer this question: What sum of money will fairly and reasonably compensate the plaintiff for legal services rendered and expenses incurred after June 24, 1976?

a. Legal Services? Answer:$_____
b. Expenses? Answer:$_____

It is obvious that the instructions divide the plaintiff's and the defendant's dealings into two distinct categories; those before June 24, 1976 and those after. June 24, 1976 was the date of sentencing in the Federal criminal tax case. The suggestion is clear that one fee agreement covered one portion of time and another portion covered another portion of time. Thus, the jury could conclude that any work done by plaintiff after June 24, 1976 would entitle him to more fees, since the original contract only went to June 24,

1976.

The evidence on this was in direct opposition. Although Mr. Crowley saw it as set forth in the verdict, Mr. Eisenberg believed the original contract went far beyond June 24, 1976. Mr. Eisenberg testified as follows:

> "Mr. Eisenberg: My understanding was after the discussion that I was to pay Twenty Thousand Dollars for the trial and including the Court of Appeals if I had to go there; but if I had to go to the Court of Appeals, I had to add Three Thousand Dollars for briefs. Then I was to pay Thirty Thousand Dollars to go all the way through, if I had to go to the United States Supreme Court, including the petition for certiorari. If the case was dismissed on motions, which Mr. Crowley agreed to handle, I am trying to be responsive if I may, then only Ten Thousand Dollars." (Testimony of Sydney Eisenberg, Transcript of Proceedings dated November 27, 1979, p. 130, App. p.A34)

This grasp of a date and the suggestion it carries that two contracts existed is certainly an incorporation of an assumption by the Court with regard to a disputed fact. Such practice invades the province of the jury and

is in error. Webb v. Wisconsin Southern Gas Co., 27 Wis. 2d 343, 134 N.W. 2d 407 (1965).

The law in Wisconsin is that it is error sufficient to reverse a judgment for counsel to impute facts not pertinent to the issue but only calculated to prejudice the case. Chapman v. Keefe, 37 Wis. 2d 315, 155 N.W. 2d (1967).

It is obvious that the remark made by Mr. Melnick bore no pertinence whatsoever to the issues before the jury. It was made simply to induce prejudice into the jury. Conduct such as this cannot be condoned. There can be no doubt that the cumulative errors outlined thus far had the effect of prejudicing the jury. Defendant-appellant had the right to a fair and unbiased jury. He is, thus, entitled to a retrial. The U.S. Constitutional right to due process was disregarded again and the result was a disaster.

IV. THE TRIAL COURT VIOLATED THE DUE PROCESS RIGHTS OF THE DEFENDANT WHEN IT REFUSED TO ADJOURN MOTIONS AFTER VERDICT UNTIL A TRANSCRIPT COULD BE PREPARED.

Due process requires that a party affected by a proceeding shall have the right to raise such issues or to establish such defenses which he may have in the cause. Willner v. Committee on Character & Fitness, 373 U.S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175 (1964). In the case at bar defendant was wholly prohibited from making any reasonable presentation on motions after verdict since he was prohibited from first securing a transcript.

The defendant-appellant and his attorney did all they could to procure a transcript before the hearing. Mr. McCann, defense counsel, detailed these steps:

> "Now, there are quite a few problems in this case, and to do justice we have to have not only a copy of the testimony with Your Honor's instructions, and we have done everything we possibly can do

"to get that, because attached to our motion for an adjournment today is a Xerox copy of a letter that was written to the court reporter and that letter was written December -- December 7th, and I think it is very important in support of our motion. It is a letter from Mr. Eisenberg to the court reporter, December 7, 1979.
'Dear Madam: My wife ordered a copy of the argument to the jury, together with all of the opening and closing arguments by Mr. Melnick, and my counterclaim. She stated that you were going to call her and inform her of the bill but we have heard nothing from you. Accordingly, I am sending you my check for $500 and ordering the entire transcript, as well as the argument to the jury. If more money is needed, please advise me immediately. Enclosed is a self-addressed envelope for convenience for your reply.' Never heard anything from her. Then we subsequently had correspondence with her about getting out the transcript. She wrote some letters which we have attached some of them. I think they were addressed to the fact that they had taken her off some duties and she had to get out transcripts in adoption cases, and couldn't do anything else. Now that is quite a while ago, and why she hasn't done it, I don't know.
"Now, I submit that this is the case where we certainly ought to have the transcript before we have to argue the motions after verdict, and I don't know what more we can do to get them. I think what should be done, the Court should order her to pro-

"ceed with getting out the transcript ahead of everything else as soon as she humanly can to do so, and to adjourn this case for a short period of time. As soon as we have the transcript - we get the transcript today, we would be ready to argue this case within 72 hours after we get the transcript." (Transcript of Proceeding dated March 7, 1980, p.3-4, App. p.).

The motions after verdict made by the defendant in all but one instance out of 11 motions called for inspection of the record. The trial covered eight volumes of transcripts and was eight days long. Considering this length and in the interest of justice, the motions after verdict could be more fairly determined with the assistance of the transcript.

The Trial Court, as an Appellate Court, is bound by what the records show in the absence of a transcript. DeToro v. DI-LA-CH, Inc., 31 Wis. 2d 29, 142 N.W. 2d 29 (1966). Thus, the motions filed by defendant have to be based on what the affidavits or other records

show with regard to factual matters. The delay necessitated in waiting for the preparation of the transcript would have been well worth the likelihood of error caused by rendering decision on the motions without the recorded transcript. In light of the lengthy trial and the number of factual issues in defendant's motions, defendant asserts the Trial Court abused its discretion in failing to adjourn the post-trial motions until a transcript could be completed. The Appellate Court simply kept giving the reporter more time, repeatedly, to prepare the transcript, until someone ultimately prepared it.

V. THE TRIAL COURT VIOLATED THE DUE PROCESS RIGHTS OF THE DEFENDANT BY ALLOWING PLAINTIFF'S COUNSEL TO REFER TO DEFENDANT AS BEING GUILTY OF MURDER IN THE PRESENCE OF THE JURY

The defendant's past was discussed at length during the trial. At one time he had attempted to assist Judge Krueger, a Milwaukee

Judge, during a desperate time. Shortly thereafter the Judge took his own life, after a newspaper reporter called the Judge and falsely told the Judge he was being removed. The Milwaukee Journal newspaper, which had been at odds with both defendant-appellant and Judge Krueger, intimated that the Judge's death had somehow been brought about due to Mr. Eisenberg's actions. Although this was simply untrue, the jurors were aware of the discussions since many had lived in Milwaukee during the period, and due to the fact this occurrence was discussed at trial. Thus, any reference by plaintiff's counsel to de-defendant being "guilty of murder" had profound implications. Yet during his closing arguments, Mr. Melnick, plaintiff's attorney, addressed the jury as follows:

> "Mr. Eisenberg is not the kind to leave a stone unturned, and he is smart as they come; and he has built an empire

"on the basis of that intelligence and he has gotten away with murder in a sense, not literally, in the sense only how he conducts his affairs, because he is smart." (Transcript of Proceedings December 5, 1979, p. 31, App. p.)

Being a murderer is bad enough; "getting away with it" is as inflaming, insiduous, base, vile and evil as any human being can be accused of. In this case, any possibility of fair play becomes a mockery.

VI. THE TRIAL COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS WHEN IT DENIED THE DEFENDANT-APPELLANT HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES TESTIFYING AGAINST HIM.

Procedural due process requires that the defendant confront and cross-examine witnesses against him, particularly where his livelihood is at stake. Willner v. Committee on Character & Fitness, supra.

As is obvious from a cursory reading of the transcript, the primary factual issue in regard to defendant's counterclaim was

what occurred during the Federal Court tax trial, especially in regard to George Crowley's actions and intentions. The defendant was not allowed to question any of the witnesses who were testifying against him.

Although defendant's attorney, Mr. Ray McCann, was allowed to cross-examine these witnesses, this method of cross-examination could not be effective since McCann was not present at the tax trial in Federal Court, and thus could not have experienced the attitude and behavior of George Crowley during the Federal trial. Thus, no real cross-examination was available.

When defendant tried to assist Attorney McCann with his cross-examination, plaintiff's attorney utilized this to distort the factual occurrences at trial, saying, in essence, "How can this man, Sydney Eisenberg, claim he was railroaded into doing things by his

"attorney, George Crowley, when you observed him continually instructing his present attorney, Mc. McCann." Nothing was said about Mr. McCann being in his eighties and hard of hearing, although a very fine decent human being. In reality, George Crowley forced Mr. Eisenberg to sit behind the rail of the courtroom and permitted no communication. Thus, the insinuation made by plaintiff's counsel was totally false.

Beyond that, however, was the fact that defendant's right, under the Constitution, to cross-examine hostile witnesses, was abridged by the Trial Court's refusal to allow him to cross-examine. Any party has a right to cross-examine witnesses who testify against him and this is the cornerstone of the right of confrontation under the United States Constitution. Neider v. Spoehr, 41 Wis. 2d 610, 165 N.W. 2d 171 (1969).

There can be no justice when a litigant is attacked with unsavory, unwarranted accusations and deprived of his constitutional rights.

There can be no justice when instructions given to a jury provided conclusions rather than explanations of law.

There can be no justice when a $14,000 annual income is corrupted into a $900,000 annual income and fed to a jury which was chosen to find the truth as to a question of negligence and the amount of a contract between parties. Passion and prejudice rode rampant.

In the instant case, there was no written contract. The questions should have been determined objectively, dispassionately, and fairly. It certainly was not so determined.

Additional errors were made by the Trial Court. Defendant requested, at the tax trial, that his attorney, plaintiff Crowley, call witnesses as part of his defense. Plaintiff Crowley refused to do so without examining the witnesses. Witnesses were available in the courtroom area for the Federal Court case. They knew defendant had made no entries nor had anything to do with bookkeeping records. Plaintiff Crowley's conduct in refusing to call any of the many bookkeepers available to be called was unreal. Witnesses called in the instant case made it clear throughout their testimony that defendant was in no way, shape, form or manner guilty of any wrongdoing in the tax case.

Since there was no denial of the fact that defendant asked to have his case defended at the conclusion of the I.R.S. Case, plaintiff

Crowley was negligent as a matter of law. Plaintiff was required to defend the motions and allegations involved, to protect defendant's rights, as a matter of law. Defendant at all times claimed to be innocent. Plaintiff Crowley should have thoroughly investigated the case. He did not, obviously.

On page 100 of the Transcript dated November 27, 1979, the following colloquy takes place:

"MR. McCANN: Q Did you ever tell Eisenberg in substance and in effect that you could be in control of the case, and you didn't want him talking as a witness?
(p. 101) "A Of course, yes.
"Q And did you also tell him that you were depending on him to get whatever witnesses he wanted to get?
"A No.
"Q Who was going to get the witnesses?
"A Myself and Mr. Manning.
"Q Can you give me the names of any witnesses that you got and put on the witness stand?
"MR. MELNICK: Objection.
"THE COURT: Sustained. There were no witnesses called.
"(Mr. McCann continues with the cross examination of the witness, George D.

"Crowley."
"MR. McCANN: Q Now, isn't it true that you attended the pre-trial hearing along without your client?
"MR. MELNICK: Objection, asked and answered.
"THE COURT: That objection is overruled.
"THE WITNESS: I attended the pretrial conference in Milwaukee with Judge Harlington Wood with Mr. Manning and myself, Mr. Bukey of the United States Attorney's Office and a second assistant U.S. Attorney. My client was not present in the room. He was sitting outside of the Courtroom
"Q When was he sitting outside of the room?
"A I told him not to come in."

John Zerbel, on page 24 of the November 27, 1979 Transcript, testified that he was present at the tax trial together with Gil Rodney, one of the personnel in his office, who was specifically engaged in handling details regarding the Eisenberg account. Mr. Zerbel testified, on page 23 of said Transcript, they had had no conference with defendant nor his attorney in the case prior to commencement of the trial as to whether or not he was to be a witness. He attended the trial as a

technical observer, together with Mr. Rodney, who was prepared to testify. Neither one was ever called as a witness. He further testified that he was a C.P.A. retained to study the records in preparation for the trial. Although he had examined all of the records involved, and was aware of the fact that the case had been dropped for a whole year, and was aware of all the issues in the case, he was never called as awitness. (page 25 of said Transcrpit) He stated that from an accounting point of view the government did not have a case (page 26). On page 27 he said that the government's case was defective in cases supporting their position, both the net worth and the specific issues. Mr. Melnick objected, and motioned to strike. This very pertinent testimony was stricken by the Trial Judge (page 27). Although he was a certified public accountant being examined

on the issues, his testimony certainly would have been significant as a defense witness at the tax trial. Mr. Zerbel stated that bonds cashed in by defendant had been replaced by him, but this testimony was ruled out by Judge Fiedler. Certainly, this testimony would have cleared defendant at the tax trial, had Judge Wood known or been advised that defendant had cashed in bonds but replaced them immediately with an equivalent value of stocks, Judge Wood would have understood and learned the whole truth rather than being fed misleading statements by the prosecution.

Plaintiff Crowley's refusal to explain an issue involving approximately $250,000 was sheer negligence. It would have taken Plaintiff Crowley no more than twenty minutes or half an hour to prepare the motion for a new trial in the interest of justice within seven

days of the finding by the Judge. Defendant testified Crowley said he would do it. Instead, Crowley drew a motion for a new trial, which probably took half an hour, or, at the most, one hour to prepare. Crowley had nothing whatsoever to do with the Appeal hearing before the Court of Appeals. How is it possible that Plaintiff Crowley would have the effrontery to charge $10,000. 00, or any other similar amount, for a motion for a new trial he could never explain to the jury nor go into in any detail? The answer is obvious. There should have been no Appeal required. Crowley had been paid in full for a job never completed. Crowley never orally argued the motion for a new trial. He charged exorbitantly for a simple motion he never argued. This motion was actually worthless. It was untimely, meaningless and never argued. A charge of $10,000 is unfair and a violation of due process.

VII. PLAINTIFF CROWLEY VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS BY REFUSING TO INTERPOSE A DEFENSE DURING THE CRIMINAL TAX TRIAL OVER DEFENDANT'S OBJECTIONS.

As noted above the right of due process includes the right to present any defense the party may have. Willner v. Committee on Character & Fitness, supra. George Crowley waived this right in defendant's criminal tax trial over the defendant's objection and specifically violated the constitutional rights of defendant in doing so.

As a matter of law, Plaintiff Crowley, in the tax trial, was required to interpose a defense when requested by the defendant. He accepted the duty to properly investigate the case and call the witnesses in the defense of the tax case. Plaintiff maintains he had no such duty. He says he was not required to argue Shellow's motions. Agreements meant nothing to plaintiff. Plaintiff cannot jus-

tify the preparation of the motion from a time standpoint, in any manner. The motion was simply cumulative. There was nothing to argue. He was not only guilty of negligence as a matter of law, but his decision to depart from the case without interposing a defense was irresponsible and reckless. If he felt that plaintiff, United States, had not made out any case whatsoever, after the Court had warned him that the plaintiff had made out a prima facie case, that warning should have stood out like a clarion alarm. Any lawyer-like conduct would have required that he proceed to call defendant's witnesses, including the defendant, himself, all of whom were willing, anxious and able to testify in the case. Plaintiff was guilty of either arrogance or crass negligence in proceeding to drop the defense. Plaintiff admits he heard the defendant tell Judge Wood

he wanted to testify and call witnesses. A motion for a new trial in the interest of justice would have corrected Plaintiff's mistakes. He claims he would have been paid in addition to the sums already paid. Defendant testified he requested such motion. Plaintiff nowhere denies the request was made. Plaintiff not only admittedly entered no defense in the case, defendant never had a fair trial, and when advised defendant was making a claim against Plaintiff, Plaintiff jumped in first with a lawsuit for money he did not earn.

In the course of the trial Mr. Eisenberg stands uncontroverted on his statement reported as follows: (Pages 94, 95 of the Transcript dated November 27, 1979.)

"EXAMINATION BY MR. McCANN:
"Q You have been present during these proceedings in chambers?
"A Yes.
"Q Do you know what has been discussed?

"A Yes.
"Q What is your testimony as to the dates of filing and when they were filed?
"A Before we left the Courtroom I asked Mr. Crowley the same way, exactly like I asked the Judge, and it is in the transcript, to be permitted to testify and have a new trial. I asked Mr. Crowley, 'Please get a new trial in the interests of justice.' And Mr. Crowley said, 'I will.'
"We left the courtroom. I called Mr. Crowley a day or two later. I think this was on Tuesday. I called him within forty-eight hours and said, 'Please remember to get it out.' And he said, 'I got a lot of things to do, but I will get it out.' And I said, 'There is a time limit on it and you got to get it out, because if you get it out I am certain that he will give us a new trial and I can testify.' And he said, 'I will get it out.'
"He didn't get it out, and I kept calling. I talked to Manning. I talked to him. The seven days were gone. He told me that the twenty-day rule applied, because the Judge had said twenty days. But the Judge wasn't referring to that seven-day rule, and he never asked for it. And he didn't ask for it on page ten sixty-four, whatever page he said he did.
"He never asked for it on that page, like he just testified under oath that he did. He never did. And if you look to that page, you will see that he never asked for permission to make the motion. He didn't make any motion, exactly contrary to what he testified.
"And I submit that was wrong. I insisted

"on testifying. I wanted a new trial. I didn't want to lose. He didn't win the case, and he lost, and he wrecked my life."

It was inexcusable for Plaintiff to "mouse-trap" defendant into waiving a jury. The pretrial order of Judge Wood discovered by defendant after the trial was over states that the jury will be waived providing Plaintiff Crowley remains in the case. There was no reason given by plaintiff Crowley for keeping defendant out of the pretrial conference. Obviously he had to get defendant out of the way in order to tell the Judge he was waiving the jury. When defendant entered the trial room for his jury trial, the Court was ready to try a "bench case." Defendant was told to sign a jury waiver. The Trial Judge had been elevated to the Court of Appeals in the interim, and was trying the case to "clean up" his calendar. Defendant had no intention of disturbing or aggravating

Judge Wood, so he signed the waiver. He realized Mr. Crowley was untrustworthy as a lawyer and a human being. But Plaintiff Crowley's conduct became even worse, and the defendant saw his defense deteriorate, and, finally disappear without being heard. He fired Mr. Crowley and retained new counsel to appeal immediately.

VIII. THE SUPREME COURT OF THE STATE OF WISCONSIN VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS OF LAW WHEN IT REFUSED TO REVIEW THE DECISION OF THE WISCONSIN COURT OF APPEALS WHEN SAID DECISION WAS AUTHORED BY HONORABLE LEO HANLEY, A JUSTICE WHO THE DEFENDANT-APPELLANT FILED A TIMELY REQUEST FOR SUBSTITUTION AGAINST WHICH WAS IGNORED.

Due process of law requires that a hearing be held before an impartial tribunal. Such impartiality and guarantees also extend to any appellate procedure where the right to such appeal is granted. District of Columbia v. Clawans, 300 U.S. 617, 81 L. Ed. 843, 57 S. Ct. 660 (1931).

In the case at bar the Court of Appeals was, at the time of this appeal, missing one member and therefore in need of a reserve justice. Upon being notified by the Court of Appeals that said Reserve Justice was to be the Honorable Leo Hanley the defendant immediately filed a timely request for substitution. This request was not only not honored but totally ignored by the Court of Appeals.

Indeed, Justice Hanley not only participated in the decision, but authored it.

Appellant submits that this is a flagrant violation of his right to due process.

CONCLUSION

For all these reasons, in concert, this case should be returned for a new trial and this case merits having a Writ of Certiorari granted by this Court.